<u>आयकर अपीलीय अधिकरण "ई" न्यायपीठ मुंबई में।</u>
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य **एवं** श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI SANJAY ARORA, AM AND SHRI AMIT SHUKLA, JM

आयकर अपील सं./I.T.A. No. 7716/Mum/2012
(**निर्धारण वर्ष /** Assessment Year: 2009-10)

ITO-13(2)(4), Room No. 412, 4th floor, Aaykar Bhavan, M. K. Road, Mumbai-400 020	**<u>बनाम</u>**/ Vs.	Sajjankumar Didwani C/o. Sajan Steels, 406-B, Bharat Chambers, 52C, Baroda St., Carnac Bunder, Mumbai-400 009
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AFUPD 1216 J		
(राजस्व / **Revenue**)	:	(निर्धारिती **/Assessee**)

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आयकर अपील सं./I.T.A. No. 7793/Mum/2012
(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Sajjankumar Didwani C/o. Sajan Steels, 406-B, Bharat Chambers, 52C, Baroda St., Carnac Bunder, Mumbai-400 009	**<u>बनाम</u>**/ Vs.	ITO-13(2)(4), Room No. 412, 4th floor, Aaykar Bhavan, M. K. Road, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AFUPD 1216 J		
(निर्धारिती **/Assessee**)	:	(राजस्व / **Revenue**)

राजस्व की ओर से/**Revenue by**	:	Shri Ashok Suri
निर्धारिती की ओर से / **Assessee by**	:	Shri Pankaj R. Toprani

सुनवाई की तारीख / **Date of Hearing**	:	13.03.2014
घोषणा की तारीख / **Date of Pronouncement**	:	28.05.2014

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is a set of two Appeals being, i.e., cross appeals by the Revenue and the Assessee for the assessment year (A.Y.) 2009-10 arising out of the Order by the Commissioner of Income Tax (Appeals)-24, Mumbai ('CIT(A)' for short) dated 08.10.2012, partly allowing the assessee's appeal contesting its assessment for the said year vide order u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 19.12.2011.

2. We shall take up the two appeals in seriatim.

Revenue's Appeal

3. The facts in relation to the Revenue's appeal, raising a single issue per its two grounds, is that the assessee's accounts were during the course of assessment proceedings observed by the Assessing Officer (A.O.) to bear trade credits at Rs.259.93 lacs, working to about 40% of the purchases for the year, being at Rs.652.95 lacs, i.e., approximating to nearly five month's purchases, which in his view was definitely quite high. Entertaining doubts with regard to the genuineness of the credits, notices were issued u/s.133(6) by him to four creditors having outstandings since long, liability *qua* which aggregated to Rs.78.70 lacs. Replies were received from two parties, for a total credit of Rs.65.41 lacs. For the balance liability of Rs.13.29 lacs, detailed as under, notices were either returned or not responded to by the concerned creditors:

Sr. No.	Parties	Amt (Rs.)	Remarks
1	Swastik Enterprises	2,94,345/-	Returned
2	Pasad Steels	10,34,124/-	No Reply

No confirmation or any other material evidencing the existence of any liability to the concerned parties being furnished in the assessment proceedings, the A.O. considered the same as not representing an extant liability, and added the same as the assessee's income for the year applying section 41(1) of the Act, i.e., on account of remission or cessation of liability. In appeal, the assessee found favour with the ld. CIT(A) on the

basis that the relevant details stood submitted. The parties were existing, and there was nothing to show that there was a remission or cessation of liability or part thereof. The ld. CIT(A) accepted the assessee's claim, holding thus: (pg. 7 of the impugned order)

> 'From the language of the section, it has to be seen whether assessee obtained, in cash or kind any benefit in respect of trading liability. In the 'A' case these trading liabilities have been shown as outstanding as on 31.03.2009. In this case, therefore, it is to be seen whether assessee furnished details as required by the 'AO', if he furnished, regardless of the details furnished, whether the credits can be treated u/s.41(1). Here, the 'A' submitted that he filed the details to the AO to show that the parties are existing, he has also informed that the parties did not give up this loan. The AR also submitted that subsequently the amounts have been paid to the creditors. In these circumstances based on the facts available on record, as the parties are identifiable and remission did not take place, the AO is not correct in treating the amount of Rs.13,28,469 under section 41(1) of IT. Act. Therefore, he is directed to delete the addition u/s.41(1). Thus, this ground of appeal is allowed.'

Aggrieved, the Revenue is in appeal, raising the following grounds:

> 1. (i) On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deleting addition of Rs.13,28,469/- made by the A.O.
>
> (ii) While doing so, the ld. CIT(A) has erred in admitting the new evidence with respect to proof of payment subsequently to the creditors viz. M/s. Swastik Enterprises and M/s. Pasad Steel in violation of Rule 46A. The verification of the genuineness was essential as these creditors were named by the Sales Tax Department as "Hawala Givers".

4. We have heard the parties, and perused the material on record.

4.1 Our first observation in the matter is that whether a liability reflected in the assessee's books of account is indeed so, i.e., represents the assessee's liability to the creditor concerned in the stated sum at the relevant point of time, is a matter of fact and not of law. Two, apparent is to be considered as real, so that the liability having been claimed and allowed in the past, it continuing to be reflected as so in the assessee's regular books of account, which have evidentiary value u/s.34 of the Evidence Act, the presumption in law would only be that the outstanding liability indeed continues to obtain as at the relevant year-end. So, however, when the liability continues to subsist year after

year, for several years, serious and valid doubts as to its existence or as representing an existing liability, may arise. This is as in the very nature of the events, nobody would ordinarily, i.e., without justifiable reason, not claim his dues, representing his hard earned money or capital built up over years. Then, again, why would one not agitate the matter or take legal recourse to effect recovery. That is, the said presumption fails on the test of human probabilities in the facts and circumstances of the case. Of course, there could be genuine and valid reasons obtaining in a particular case, so that a credit though outstanding in the books for long, represents a genuine liability. Why, loans on interest-free basis or toward risk or seed capital by way of subscription to shares, is given with no time prescribed for its return back or even any stipulation with regard to return thereon. Again, in a given case it could be that the liability remains to be recovered for want of time or resources with the creditor, i.e., to pursue the legal recourse. If so, the recalcitrant debtor stands benefited to that extent. *In other words, the matter is primarily and essentially factual*.

The hon'ble Delhi high court per its recent decision in the case of *CIT vs. Chipsoft Technology (P.) Ltd.* [2012] 210 Taxman 173 (Del), examining the legal aspect of the matter, has clarified that the view that merely because a liability outstands in books, and that lapse of time bars the remedy but does not efface the liability, is an abstract and theoretical one which does not ground itself in reality. The interpretation of law, particularly fiscal and commercial legislation, is to be based on pragmatic realities. It would be indeed paradoxical, if not illogical, to allow the assessee-debtor to, while avoiding a liability on the basis that it is no longer enforceable in law, yet claim his status as a debtor, so that he was indeed liable for the amount reflected as a liability in accounts. Further, *Explanation* 1 to the provision inserted by Finance (No.2) Act, 1996 w.e.f. 01.04.1997 proscribes an assessee to claim an indebted status while writing back the amount in books, even if unilaterally, in its respect. The word employed in the said *Explanation* is 'include' and not 'means', so that it is not to be read in a restrictive manner. The tribunal explained the scope of the said *Explanation* in the case of *Kalyani Maan Singh vs. ITO* (in ITA No. 6500/Mum(A)/2011 dated 14.11.2013) to mean that

the assessee, even as accounts are not sacrosanct, cannot assume a stand contrary to his own accounts. *Explanation* 1, accordingly, could not be interpreted to conclude that there is or could be no remission or cessation of liability unless the same is written off in accounts. The argument that there was no period of limitation in respect of a liability being disputed under the Industrial Disputes Act was also repelled by the hon'ble court in *Chipsoft Technology (P.) Ltd.* (supra) on the basis of the decision by the apex court in *The Nedungadi Bank Ltd. vs. K. P. Madhavankutty* Air 2000 SC 839, holding that a stale dispute ousts itself from being entertained and adjudicated. As would be seen, the hon'ble court has sought to read the provision consistent with the facts of the case, and not on the basis of a theoretical construct alone, divorced from the facts of the case. Reference was made both by the hon'ble court as well as the tribunal in the afore-referred decisions to the decision in the case of *Kesoram Industries & Cotton Mills Ltd. vs. CIT* [1992] 196 ITR 845 (Cal.) to the effect that the non-discharge of a liability over a long period of time, coupled with absence of any dispute and/or of legal recourse, would lead to a firm basis to infer remission or cessation of liability. The said decision by the hon'ble court stands followed and adopted by the tribunal, as in *ITO vs. Shailesh D. Shah* (in ITA No.7012/Mum/2010 dated 11.12.2013) and *Yusuf R. Tanwar vs. ITO* (in ITA No.8408/Mum/2010 dated 28.02.2013). Accordingly, an omission to pay could give rise to the legal inference of cessation of liability. True, an amount may continue to outstand in accounts, so that the assessee is *prima facie* liable in its respect. However, it is the veracity or the truth of those very accounts, constituting the assessee's evidence, that the assessee is required to establish. *The matter would, therefore, have to be decided in light of the conspectus of the facts of each case*.

4.2 Continuing further, the assessee failing to furnish confirmations from the two creditors under reference, the A.O. inferred the said credits, notwithstanding their being reflected as payables, as not representing the assessee's liability thereto as on the relevant date (31.03.2009), so that there was a cessation of liability during the year, attracting section 41(1). As afore-noted, the basis of relief to the assessee by the ld. CIT(A) was the

absence of any material with the Revenue to exhibit a remission or cessation of the impugned liability. That, in our view, is requiring it (the Revenue) to prove a negative. The primary onus to prove its return, and the claims preferred thereby, is only on the assessee (refer: *CIT v. Calcutta Agency Ltd.* [1951] 19 ITR 191 (SC)). The return being premised on a particular sum/s as being the assessee's liability, its existence as such, so that the assessee was indeed liable as at the relevant year-end - a matter of fact – could only be shown by the assessee where called upon to do so by the Revenue in the face of genuine doubts as to it being indeed so. It could be argued that even where the assessee is unable to prove the existence of a trade liability as at the relevant year-end, which though continues to outstand in books, would yet not exhibit that the remission or cessation of the liability during the relevant year, and which is a prerequisite for the application of section 41(1). The argument, attractive at first sight, in-as-much as the same represents a primary ingredient of the relevant provision, fails on scrutiny. This is for the reason that the assessee reflecting the amount as a liability in his books for the immediately preceding year, has confirmed it as so as at the end of that year, i.e., 31.03.2008 in the present case. It does not therefore lie in his mouth or is not open for him to say or contend that it was not so, and that the amount was in fact not outstanding even on that date. The Revenue has merely proceeded by accepting the assessee's claims and books for that year. The principle of approbate and reprobate would therefore apply to estopp the assessee from taking such a stand, i.e., legally. The anomaly stands explained famously by the hon'ble apex court in *Phool Chand Bajrang Lal vs. ITO* [1993] 203 ITR 456 (SC) in the context of reopening of reassessment u/s.147, which requires the assessee to disclose all material facts fully and truly: **'***You accepted my lie, now your hands are tied and you can do nothing*.' It clarified that it would be a travesty of justice to allow the assessee that latitude. *What would, accordingly, be required of us is an examination of the facts and circumstances of the case to draw a finding of fact based thereon, as to the existence or otherwise of the liabilities under reference*.

4.3 Coming to the facts of the case, we firstly observe that no reason or explanation whatsoever stands furnished by the assessee at any stage for the trade liabilities to subsist for years, raising genuine doubts as to their existence as at the relevant year-end. *Could a liability continue to outstand for years without any reason, and which could only be furnished or explained by the assessee, the debtor, being in the intimate know of its affairs*?

Coming to the specifics of the two trade credits, i.e., the positive materials, if any, furnished by the assessee to establish the existence of the liability as at the relevant year-end, we find confirmation of the account statement as appearing in the assessee's books of account from Pasad Steels (PB pgs.13-14). The same bears the PAN of the creditor as well as the fact of payment thereto in the impugned sum vide cheque no. 201088 on 28.03.2012. Even though the said confirmation is accompanied by a certificate by the ld. AR to the effect that the same stood furnished before the A.O., it is clearly false in-as-much as the assessment order is dated 19.12.2011. *How could a transaction dated 28.03.2012, which would only be confirmed by the creditor on or after the said date, be reported to the A.O. on 19.12.2011, even as the hearing before him would have presumably closed prior thereto*? This falsity on behalf of the assessee is highly condemnable to say the least and needs to be depreciated in the strongest terms. What anguishes us equally is that the same was not pointed out by the ld. DR during hearing, and which is particularly astonishing considering that the Revenue's main charge is that the concerned creditors are not genuine traders but only hawala operators, providing accommodation entries, and that evidence had been admitted and acted upon by the ld. CIT(A) in contravention of rule 46A. That the ld. CIT(A) has also done so with abandon, i.e., in clear valuation of 46A, is also very unfortunate. Be that as it may, giving the assessee the benefit of doubt, i.e., that the certificate is partly correct, and that the said confirmation stood furnished before the first appellate authority (who though has not given any finding in the matter), we only consider it fit and proper in light thereof that the matter is restored back to the file of the A.O. for verification of the assessee's claims as regards its liability to M/s. Pasad Steels, and decide the issue arising afresh by issuing

definite findings of fact, particularly with regard to the genuineness of the payments claimed to be made during f.y. 2008-09, after allowing reasonable opportunity of being heard to the assessee. We decide accordingly.

No such confirmation or any other material evidencing the existence of the liability to the other party, Swastik Enterprises, stands admittedly furnished at any stage, with the notice to him by the A.O. returning unserved, for which again no explanation stands furnished by the assessee. The amount is outstanding since 09.07.2003, i.e., for a period of almost six years as at the end of the relevant previous year, and for over 9 years by the time the matter stood decided by the first appellate authority. Nor reason for the same stands advanced at any stage, and even no claims with regard thereto were made before us, i.e., after a further lapse of another 1 ½ years. Under the circumstances, the same can clearly be said to be unproved, and we therefore confirm the application of section 41(1) in relation to the said credit. We decide accordingly.

Assessee's appeal

5. The assessee's appeal raises three grounds. While ground no. 1 was not pressed during hearing, the other two, i.e., ground nos. 2 & 3, are in relation to the confirmation of the addition in the sum of Rs.3,52,090/- effected and sustained u/s.68 of the Act. The facts in brief are that the assessee's accounts reflected advances from debtors at Rs.76.78 lacs as at the year-end. The same continuing from year to year, the A.O. entertained doubts as to the genuineness of the said credits. The assessee being unable to, in spite grant of opportunity, furnish confirmations therefrom or even their addresses, the entire amount stood added as income u/s.68 of the Act. In appeal, the assessee submitted that of the total sum only the impugned sum of Rs.3,52,090/- pertained to the current year; the Advance account bearing an opening balance (as on 01.04.2008) of Rs.73,25,923/-. Relying on the decisions in the case of *CIT vs. P. Mohanakala* [2007] 291 ITR 278 (SC) and *CIT vs. Shri Vardhaman Overseas Ltd.* [2012] 343 ITR 408 (Del), clearly section 68 applies only to a sum credited in the assessee's books during the relevant year. Accordingly, the assessee having failed to furnish the relevant details or prove the credits,

he confirmed the addition for the credits to the extent arising during the year, i.e., for Rs.3,52,090/-. Aggrieved, the assessee is in second appeal.

6. We have heard the parties, and perused the material on record. No improvement whatsoever in its case stands made by the assessee before us. The assessee's sole basis for contesting the same, which stood also raised before the ld. CIT(A), who though did not find it convincing, is that the payment to the extent of Rs.3,01,090/- stood made in the immediately succeeding year. The claim is misplaced. Though there is no finding to that effect by the authorities below, the payment to the stated extent may find reflection in the assessee's books of account for the following year. So however, it needs to be appreciated that if the entries in books were final or conclusive, no addition u/s.68 could at all be made. It is on the failure of the assessee to prove the veracity or the truth of the entries appearing in his accounts, which would lead to invocation of section 68 or any other relevant provision for that matter. Reference in this context may be made to the decision in the case of *CIT vs. Kamaraia Pandian* [1984] 150 ITR 703 (Mad) whereat this aspect of the matter stands explained. We, therefore, find no merit in the assessee's case and, accordingly, confirm the impugned addition.

7. In the result, the Revenue's appeal is partly allowed and partly allowed for statistical purposes, and the assessee's appeal is dismissed.

Order pronounced in the open court on May 28, 2014

Sd/-	Sd/-
(Amit Shukla)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 28.05.2014

व.नि.स./Roshani, Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**